

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THOMAS C. GILBERT and DEPARTMENT OF THE NAVY,
MARE ISLAND NAVAL SHIPYARD, Vallejo, CA

*Docket No. 01-2125; Submitted on the Record;
Issued February 21, 2003*

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
A. PETER KANJORSKI

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

On July 18, 1983 appellant, then a 34-year-old machinist, sustained an employment-related traumatic injury. The Office initially accepted appellant's claim for cervical strain. Appellant later experienced multi-level cervical disc herniations and the Office authorized three surgical procedures performed in January 1985, February 1991 and most recently on July 28, 1997. Appellant ceased working July 19, 1983 and except for a brief attempt at light duty in October and November 1983, appellant has not returned to gainful employment. The Office awarded appropriate wage-loss compensation and placed appellant on the periodic compensation rolls beginning June 1, 1984.

In April 1999 appellant's treating physician, Dr. Roger W. Shortz, a Board-certified neurosurgeon, released him to full-time limited duty. The Office referred appellant for vocational rehabilitation and a rehabilitation counselor developed a plan for appellant's return to work as either a network control operator or user support analyst. As appellant lacked the required technical background, the rehabilitation plan included classroom instruction at a private adult education facility, with the objective of appellant obtaining certification as a Microsoft Certified Systems Engineer (MCSE).¹ The Office approved the rehabilitation plan on June 23, 1999 and appellant commenced training in computer technology at the Martinez Technology Education Center on July 6, 1999.

¹ The classroom instruction included initial participation in a 6-week introductory module followed by a 25-week MCSE preparatory course.

While appellant successfully completed a six-week introductory course, on May 18, 2000, the training center dropped him from the MCSE training program for excessive absenteeism.²

In a letter to the Office dated October 17, 2000, appellant expressed dissatisfaction with his assigned rehabilitation counselor's efforts. Most notably, appellant questioned why someone with no prior computer experience like himself would be enrolled in a "cram course" for Microsoft systems engineer certification. Appellant further noted that, of the 12 students enrolled in the MCSE training program, he was the only student without prior computer experience. He also stated that even the students with prior work experience could not pass the MCSE test at first. Additionally, appellant stated that daily work on the computer exacerbated his neck pain and also caused numbness in his hands and arms. He also noted that, after being away from school for about 30 years, he was not ready to go to class for 6 hours a day followed by 3 to 5 hours of homework each night. Appellant also stated that he had not worked a normal eight-hour day for years due to his employment injury, but yet his rehabilitation counselor thought it prudent to place him in a training course that effectively required more than eight-hours of work per day.

By letter dated January 12, 2001, the Office directed appellant to resume the training program at Martinez Technology Education Center that had previously been approved. Appellant was afforded 30 days to resume training or to show good cause for not undergoing training.

On March 29, 2001 the Office issued a notice of proposed reduction of compensation based upon appellant's refusal to participate in the approved vocational rehabilitation plan.

In an April 26, 2001 letter, appellant stated that he had cooperated in the rehabilitation effort. He also stated he did not quit the program, but was dropped from the program. Appellant essentially reiterated his October 17, 2000 remarks about the suitability of the MCSE training program and the difficulty he experienced sitting in front of a computer monitor for hours at a time day after day.

In a decision dated June 26, 2001, the Office reduced appellant's compensation effective July 15, 2001 to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts. The Office determined that appellant had failed, without good cause, to undergo vocational rehabilitation as directed. With respect to his wage-earning capacity, the Office further found that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the position of user support analyst.

The Board finds that the Office properly reduced appellant's compensation to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.

Section 8104 of the Federal Employees' Compensation Act provides that the Secretary of Labor may direct a permanently disabled individual whose disability is compensable under the

² The latter course began February 28, 2000 and appellant missed 1 class in March 2000, 2 classes in April 2000 and 11 classes in May 2000.

Act to undergo vocational rehabilitation.³ Additionally, the Act and the implementing regulations provide for sanctions if an employee without good cause fails to apply for and undergo vocational rehabilitation when so directed.⁴ These sanctions remain in effect until the employee in good faith complies with the Office's directives.

Section 10.519 of Title 20 of the Code of Federal Regulations details the actions the Office will take when an employee refuses to undergo vocational rehabilitation. The regulation provides in relevant part:

If an employee without good cause fails or refuses to apply for, undergo, participate in, or continue to participate in a vocational rehabilitation effort when so directed, [the Office] will act as follows:

(a) Where a suitable job has been identified, [the Office] will reduce the employee's future monetary compensation based on the amount which would likely have been his or her wage-earning capacity had he or she undergone vocational rehabilitation. [The Office] will determine this amount in accordance with the job identified through the vocational rehabilitation planning process, which includes meetings with the [Office] nurse and the employer. The reduction will remain in effect until such time as the employee acts in good faith to comply with the direction of [the Office]."⁵

As previously indicated, the Office-approved vocational rehabilitation plan included an instructional component that required initial participation in a 6-week introductory course followed by a 25-week course to prepare appellant for the MCSE examination. Appellant began the instructional component of the rehabilitation plan in July 1999 and successfully completed the 6-week introductory course. The MCSE certification course began February 28, 2000 and appellant regularly attended the course for approximately eight weeks.⁶ However, between May 1 and May 18, 2000, appellant missed a total of 11 classes due to alleged neck pain.⁷ In a letter dated May 18, 2000, the technology program coordinator advised appellant and the rehabilitation counselor that appellant could no longer participate in the MCSE training program because of the number of classes appellant had missed.

Although appellant's inability to attend class due to illness would ostensibly represent good cause for his failure to continue with vocational rehabilitation, he did not provide adequate medical documentation to substantiate his allegation that he was physically unable to attend class. After consultation with the Office, his rehabilitation counselor advised him of the need to

³ 5 U.S.C. § 8104(a).

⁴ 5 U.S.C. § 8113(b); 20 C.F.R. § 10.519 (1999).

⁵ 20 C.F.R. § 10.519 (1999).

⁶ Appellant missed a total of three days of classes in March and April 2000.

⁷ During this timeframe appellant regularly apprised both the school and his rehabilitation counselor of his inability to attend class for alleged medical reasons.

submit medical documentation for his several days of absence in May 2000. Appellant was reportedly scheduled to see his treating physician on May 22, 2000. The only contemporaneous medical evidence received by the Office was a June 5, 2000 form report from Dr. Shortz wherein he noted subjective complaints of neck pain and right hand numbness. Although he provided no objective findings, Dr. Shortz reported diagnoses of cervical disc disease and cervical radiculitis. Under the heading "Treatment Plan," Dr. Shortz noted Celebrex, rest and vocational rehabilitation. Additionally, he instructed appellant to remain off work for three months.

The notation of neck pain on Dr. Shortz's June 5, 2000 report does not of itself establish that appellant was physically unable to participate in his MCSE training course. Appellant consistently complained of neck pain since his 1983 employment injury. Dr. Shortz also reported subjective complaints of neck pain in an earlier report dated April 27, 2000. Additionally, he reported objective findings of decreased range of motion in the cervical spine. At that time, Dr. Shortz advised that appellant continue with his medication. He also noted that appellant was permanent and stationary and he recommended continued vocational rehabilitation.

Appellant stated that numerous hours seated in front of a computer monitor exacerbated his ongoing neck pain. However, there is nothing in the record to substantiate appellant's assertion that his neck pain precluded him from attending class in May 2000. Moreover, in both his April 27 and June 4, 2000 reports, Dr. Shortz recommended vocational rehabilitation. It is further noted that Dr. Shortz did not impose any specific restrictions with respect to sitting when he released appellant to perform full-time, limited duty in April 1999. Thus, the record is devoid of any rationalized medical evidence indicating that appellant was physically incapable of participating in the MCSE training program.

While the MCSE training may have been academically challenging, there is nothing in the record to suggest that appellant lacked the aptitude to complete the prescribed training. Although appellant did not technically quit the training program in May 2000, when he was offered the opportunity to resume training in January 2001, he effectively declined. Accordingly, there is no evidence that appellant's failure to fully participate in the vocational rehabilitation program was based on good cause. The record reflects that, if appellant had participated in good faith in vocational rehabilitation, he would have been able to perform the duties of a user support analyst.⁸ For these reasons, the Office properly reduced appellant's compensation to reflect his loss of wage-earning capacity had he continued to participate in vocational rehabilitation efforts.⁹

⁸ The position is described as sedentary in nature and is in keeping with the physical limitations imposed by Dr. Shortz in April 1999. Appellant questioned whether he would have been vocationally suited for the position even had he completed the MCSE training program. The Form OWCP-66 completed by the rehabilitation counselor indicated that the user support analyst position required two to four years of specific vocational preparation. The rehabilitation counselor stated that appellant would have met this requirement by completing the proposed training. He also noted that appellant had a high school education plus 12 college credits and had completed a 4-year machinist apprenticeship.

⁹ See *Kevin M. Fatzner*, 51 ECAB 407 (2000).

The June 26, 2001 decision of the Office of Workers' Compensation Programs is hereby affirmed.

Dated, Washington, DC
February 21, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

A. Peter Kanjorski
Alternate Member